Filed 9/25/12 P. v. Ramos CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. GUADALUPE MOLINA RAMOS et al., Defendants and Appellants.	B231831 (Los Angeles County Super. Ct. No. TA111850)

APPEALS from judgments of the Superior Court of Los Angeles County, Arthur M. Lew, Judge. Affirmed in part and remanded.

Edward H. Schulman, under appointment by the Court of Appeal, for Defendant and Appellant Guadalupe Molina Ramos.

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant Tania Gaytan.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Lawrence M. Daniels and Ann R. Duarte, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted Guadalupe Molina Ramos (Ramos) and Tania Gaytan (Gaytan) of two counts of forcible lewd act upon a child (counts 1 & 3) (Pen. Code, § 288, subd. (b)(1)),[1] continuous sexual abuse (count 2) (§ 288.5, subd. (a)), and two counts of lewd act upon a child (counts 4 & 7) (§ 288, subd. (a)). Ramos was also convicted of two additional counts of lewd act upon a child (counts 5 & 6). As to all of the counts, the jury found true allegations that appellants committed the crimes within the meaning of section 667.61, subdivision (b). Prior to the trial of the substantive charges, Gaytan had been found by a jury to be mentally competent to stand trial. (§ 1368.)

Ramos was sentenced to 105 years to life in state prison, which included a consecutive 15-year-to-life term for each conviction, imposed pursuant to section 667.61, subdivision (b). Gaytan was sentenced to 75 years to life in state prison, which likewise included a consecutive 15-year-to-life term for each conviction, imposed pursuant to section 667.61, subdivision (b).

Both appellants contend: (1) the trial court improperly denied their motions for mistrial, first during voir dire when the panel was tainted by the comments of two prospective jurors and later when a seated juror should have been removed for demonstrably prejudging the case; (2) the evidence of force, fear, or duress was insufficient to support their convictions on count 1 for forcible lewd act upon a child and that imposition of a consecutive 15-year-to-life term was therefore improper; and (3) punishment under the "One Strike" law on count 2 for continuous sexual abuse of a child violated ex post facto laws.

Gaytan separately contends: (1) the evidence was insufficient to support the jury's verdict finding her to be mentally competent to stand trial; (2) the jury was not properly instructed and the evidence was insufficient to support a finding that she had the requisite

---

[1] All further statutory references are to the Penal Code.

intent to support aider and abettor liability; and (3) her sentence constituted cruel and/or unusual punishment in violation of the state and federal Constitutions.

We are not persuaded by any of Gaytan's separate contentions. Nor are we persuaded by any of the jointly made contentions, other than the assertion that punishment under the One Strike law on count 2 was improper because continuous sexual abuse of a child was not a statutorily enumerated offense under the One Strike law at the time the relevant crimes were committed. We therefore vacate appellants' sentences as to count 2 and remand the matter to the trial court for resentencing. In all other respects, the judgments are affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

Appellants Ramos and Gaytan are married. From 2000 to 2008, Ramos, with Gaytan's knowledge and assistance, sexually molested Gaytan's three nieces and her daughter from a prior relationship.

V. A. (Counts 1 & 2)

V.A., born in April 1990, was 20 years old at the time of trial. Her mother, C., is Gaytan's sister. V. has two sisters, one of whom, G., was also molested by Ramos with Gaytan's assistance. In 2000, V. and her family lived in Paramount, while appellants lived in Compton. V. and her sisters often stayed with Gaytan when their mother was at work. V. and Gaytan had a close relationship; V. considered Gaytan to be like a mother to her.

When V. was 10 years old, she spent the night at appellants' apartment for the first time. Appellants and V. were in the living room; V. and Gaytan were lying down talking while Ramos, who was naked but covered with a blanket, was lying down watching "porno." Gaytan then told V. that Ramos was "going to do something," and that V. should "lay down and enjoy it." As Ramos approached V., Gaytan put a pillow over V.'s face. Ramos laid on top of her, removed her pants and underwear, and put his erect penis

in her vagina. It was painful, so V. pushed Ramos off and ran downstairs to the bathroom. She realized she was bleeding from her vagina. Gaytan came into the bathroom and began cleaning the blood from V.'s vagina and telling her that "it's nothing bad" and that "it's normal." V. then went upstairs and went to sleep.

A month later, appellants moved into the house V. and her family had been living in, and V. and her family moved to the back house on the same lot. At that point, there were more than nine people living in the three-bedroom front house, including appellants.

One night while V. was lying on appellants' bed, Gaytan told her that Ramos wanted to do something to her, and to lay down and relax. Gaytan again put a pillow over V.'s face. Ramos removed V.'s pants and underwear, and put his tongue in her vagina. After awhile, Gaytan told her, "He's almost done." When Ramos stopped, V. put her clothes back on and left the room, pretending nothing had happened. She was scared and confused because she knew it was wrong, but Gaytan made it seem like it was okay. She was close to Gaytan and trusted her.

Thereafter, the same thing happened on a continuous basis every few weeks, with Gaytan holding a pillow over V.'s face and Ramos orally copulating her. He sometimes put his hands on her breasts at the same time. This occurred more than 50 times between 2000 and 2004. She could not recall if it ever happened when Gaytan was not present; V. believed that Gaytan was always involved and she always put a pillow over V.'s face and held it there. V. agreed with Gaytan's defense counsel that when Gaytan put the pillow over V.'s face, Gaytan did not hold it there "against [her] will." V. did not make any noise when this happened because she did not want anyone else to know what they were doing to her; she did not want the family to be hurt. Gaytan would tell V. that Ramos was going to stop and not do it anymore, but it continued. On many occasions, V. was aware that Gaytan was trying to keep her away from Ramos.

When V. was 14 or 15 years old, she "stood up for [her]self" and began saying no, and the abuse ended. Thereafter, Ramos sometimes asked her to let him have intercourse with her, but V. refused and he did not insist.

V. and her mother moved to another city in late 2007 or early 2008. In late 2008 or early 2009, V. returned to live in appellants' home because she wanted to protect her sister and her cousins from Ramos and Gaytan.

V. testified that she felt she had to let Ramos copulate her because Gaytan asked her to let him do it. She did not tell anyone what was happening because she was afraid and embarrassed, and she did not trust anybody. She also did not tell anyone because she did not "want to ruin the family" or "break the family apart." As a result of the abuse, V. suffered from feelings of worthlessness and had difficulty engaging in intimate relationships. When she was 16 or 17 years old, she told her then boyfriend what had happened and later told her best friend. V. also eventually told her mother about the sexual abuse, sometime during 2010. V. said she still loved Gaytan but blamed her for failing to protect her.

G.C. (Count 3)

G., V.'s younger sister, was born in January 1996 and was 15 years old at the time of trial. In December 2008, Gaytan invited G. to spend the night at her house and received permission from G.'s mother for G. to do so. A., Gaytan's daughter, was G.'s cousin and best friend. A. and other female cousins were there as well. Gaytan, G., and the other girls spent the evening doing "girl stuff," doing their hair and nails, applying makeup, dressing up, and playing. The other girls fell asleep, but G. and A. remained awake. Gaytan woke her two sons and took them to the back house to go to bed. Gaytan returned and asked G. and A. if they wanted to sleep in the back house. They both said yes and the three of them went to the back house.

Gaytan then told the girls that Ramos was going to do something to them. Gaytan gave them comfortable shorts to put on, and they did so. Gaytan then took them into a bedroom where her two sons were sleeping. Ramos was also there. A television was on when they first entered the room, but at some point it was turned off. Gaytan "arranged [the girls] on the bed," placing them side by side on their backs. Ramos began touching G. in her "private area," i.e. her vagina, over her shorts. The room was dark so she could

not see well, but she knew that Gaytan stood watching what was happening. G. began breathing hard because she was afraid, so Gaytan put a pillow over her face. She also put a pillow over A.'s face. At no time did Gaytan hold the pillow down, hold G. down on the bed, or touch G. Ramos pushed her shorts and underwear to the side and put his mouth on her vagina. When he did, G. grabbed A.'s hand. Ramos then put his erect penis into G.'s vagina and laid on top of her. She tried to get up but Ramos pushed her back down. After he removed his penis from inside her, Gaytan cleaned G.'s vagina with a shirt.

Because the pillow remained covering her face, G. could not really see what Ramos did to A. However, she heard A. start breathing hard. The two girls continued to hold hands. After awhile, Gaytan took the pillow off of her face.

For a long time, G. did not tell anyone what had happened because she was afraid and she did not want to come to court. She did not want to cause stress to her family and herself. G. eventually told her close friend, Tabitha, that Ramos had stuck his penis into her vagina. Tabitha told G. she needed to do something. G. later told V. and, with Tabitha's assistance, she told her English teacher, Angel Garcia. Garcia said he would report it. G. eventually told her mother what had happened.

A.G. (Counts 4, 5 & 6)

A., Gaytan's daughter from a prior relationship, was born in March 1997 and was therefore 13 years old at the time of trial. In 2008, she lived with appellants and her two younger brothers in the back house. V. lived with them sometimes.

During the year 2008, Ramos touched A. inappropriately on several occasions. The first time, Ramos grabbed her breast while she was eating lunch in the kitchen of the back house. A few weeks later, A. was in the back house and Ramos grabbed her tightly and put his fingers under her pants and touched her vagina. She tried to get away from him but he would not let her. A few months later, A. was in the back house and walked from the bedroom to the bathroom. Ramos came out of his bedroom and grabbed her tightly and digitally penetrated her vagina.

In December 2008, her cousin G. spent the night with her. Gaytan, A., and G. went into a bedroom in the back house and the two girls laid down on the bed next to one another. Ramos was also in the room. Gaytan then put a pillow over A.'s face and also put a pillow over G.'s face. Ramos took off her pants and underwear, touched her vagina with his hand, and orally copulated her. He then inserted his penis into her vagina, which hurt her and felt gross. He also inserted his penis into her anus. A. held G.'s hand because she was afraid. She was breathing loudly and she could also hear G. breathing loudly. A. could not see with the pillow covering her face, but she believed Gaytan was still in the room. Gaytan did not hold A. down, and A. did not see Gaytan hold G. down. When Ramos stopped, A. and G. put their clothes back on and went to sleep.

A. did not talk to Gaytan about what had happened. She felt Gaytan, her mother, should have protected her. Shortly thereafter, A. told V. what Ramos and Gaytan had done, but asked her not to tell anyone.

Ca.T. (Count 7)

Ca.T., born in February 1997, was 14 years old at the time of trial. Her mother, M., was Gaytan's sister. A few weeks after Ca. turned 11, Ca. was sitting on the floor watching a movie in the back house. One of appellants' sons was sitting next to her. Ramos came and sat on the floor next to Ca., and touched her vagina for a few seconds. Ca. did not know what to do; she was afraid. She knew she was supposed to tell an adult when someone touched her inappropriately but she was scared that "he was going to do something" so she did not tell anyone.

A few weeks later, Ca. wanted to spend the night at appellants' house. Gaytan asked Ca.'s mother, who gave her permission. Gaytan and Ca. went into appellants' bedroom in the back house; Ramos, A., and appellants' two sons were in the room. A. and one boy were lying on the floor sleeping and the other boy was asleep on the bed. After Ca. laid down on the bed, Gaytan whispered something to Ramos for a moment, then approached Ca. and told her not to be scared, which made her feel afraid. Gaytan placed a pillow over Ca.'s face. Ramos removed Ca.'s pants and underwear and orally

copulated her. Ca. was afraid because she did not know what was going to happen. Gaytan did not touch her, hold her down, or force the pillow down into her face; she placed the pillow on her face and did not continue to hold it. When he stopped, Ca. got up and went to the bathroom. As she got up, Ca. saw that Gaytan was lying down next to her. Ca. went into the bathroom and washed her vagina, then returned to the bedroom and laid down on the floor next to A. For a long time, Ca. did not tell anyone what happened because she was afraid of Ramos. Ca. said she was not afraid of Gaytan and that she still loved her. Ca. was aware that often Gaytan would not leave her alone in the house with Ramos. If Gaytan was not there and Ca. saw Ramos, she would run out of the house.

Ca. recalled that some time after the first incident when Ramos touched her vagina while she was watching a movie, V. and Gaytan asked Ca. if Ramos had touched her inappropriately. The record does not make clear how she responded. About one year after the incident involving oral copulation, Ca. told her cousins G. and A. what Ramos and Gaytan had done to her. She later told V.

Ca. also recalled that in March 2010 she saw V. and Gaytan having an argument. Ca.'s mother M. was also present and Ca. saw her speaking to V. and Gaytan. M. then pulled Ca. aside and asked her if Ramos had touched her, and Ca. said yes. Shortly thereafter, sheriff's deputies arrived at the house and interviewed Ca.

The Investigation

Detective Marlene Vega of the Los Angeles County Sheriff's Department Special Victims Unit investigated this case beginning in late March 2010, after a report regarding Ca. was received. Vega interviewed the four victims. Because a substantial amount of time had passed since the abuse occurred, the victims were not medically examined.

Vega interviewed Ramos along with Detective Garcia. Ramos waived his constitutional rights and provided the following information. The interview was recorded and a redacted version was played for the jury; the jury was also given a transcription of the interview. Ramos said he and Gaytan had been married for 13 years. They had two

children, B. (age 11) and O. (age 16). A. is Ramos's stepdaughter; Gaytan also has another daughter and son from a prior relationship. Ramos initially denied touching any of the girls inappropriately, insisting that he merely hugged them. After the detectives told Ramos that the girls had told them everything that had happened, Ramos acknowledged that he had touched them inappropriately, stating that it was his idea to do so. He admitted having intercourse with V. once and touching Ca. once. He said he orally copulated A. and G. and touched their vaginas, but denied any other sexual activity with them. He acknowledged that what he had done was wrong and expressed regret.

Appellants did not present an affirmative defense.

DISCUSSION

I. Sufficiency of the Evidence of Gaytan's Mental Competence

Gaytan contends there was insufficient evidence to support the jury's verdict that she was mentally competent to stand trial. We disagree.

A. The Competency Hearing

In early January 2011, a hearing was held before a separate jury impaneled to decide Gaytan's mental competence to stand trial.

1. Defense Evidence

Dr. Timothy Collister, a licensed clinical psychologist, is a superior court panel expert. He had five years of experience in the field of forensic psychology.

Dr. Collister tested Gaytan to determine her competency to stand trial. Their meeting lasted about three hours. Before meeting with her, he reviewed the probation and police reports. He conducted an "extensive clinical interview," reviewed her symptoms, tested her levels of intellectual functioning, tested her academic achievement, and specifically tested her competence using the MacArthur Foundation competency test.

Gaytan provided Dr. Collister with a significant amount of information about her history and responded appropriately to his questions.

Dr. Collister stated that a person should be able to understand the criminal proceedings against him or her and to assist defense counsel in the preparation of the defense in a rational manner. A person could be incompetent to stand trial due to a mental disorder such as schizophrenia, or due to a developmental disability such as autism or mental retardation.

Dr. Collister found that Gaytan did not have a developmental disability, although her overall IQ was 78 and the cutoff to be considered mentally retarded is an overall IQ of 70. She scored 68 in the verbal comprehension portion of the IQ testing, which Dr. Collister opined would affect her ability to assist counsel in the preparation of her defense. Dr. Collister believed she suffered from posttraumatic stress disorder and mild anxiety disorder but that neither of these conditions constituted a developmental disability. Dr. Collister also diagnosed Gaytan as suffering from a major depressive disorder, childhood sexual and physical abuse, polysubstance abuse, a dependent personality disorder (axis II), and borderline intellectual functioning. Pointing to Gaytan's low verbal score, Dr. Collister opined for the first time at trial that Gaytan also suffered from a "cognitive disorder not otherwise specified." He admitted that in his report he had not mentioned how her low verbal score had anything to do with any mental disorder that he diagnosed. As to whether her low verbal comprehension score constituted a developmental disability or a mental disorder, Dr. Collister said that depression (a mental disorder) could cause that score to be low, but he did not reach the conclusion that was the case with Gaytan. He said he would have to perform further testing to make that determination. Dr. Collister stated that each of these diagnoses considered alone did not render Gaytan incompetent, but the sum total of them indicated to him that she was incompetent. Dr. Collister clarified that he did not decide she was incompetent based on her diagnoses but rather decided she was incompetent based on how she functions.

Dr. Collister described this case as being a difficult one in which to determine competency because Gaytan was "on the margin." But the totality of the circumstances indicated by her test results, history, and interview led him to conclude that she was incompetent in that she was incapable of assisting counsel in the preparation of her defense. She showed impairment in her ability to comprehend information, appreciate societial norms, and make social judgments.

Dr. Collister used the MacArthur Foundation competency test, one he uses in evaluating every patient for competency, which involved describing a vignette about a bar fight and asking Gaytan questions about it then scoring her responses. The story focused on the difference between simple assault and aggravated assault. Gaytan's responses to this test, as well as her other testing and her interview, led Dr. Collister to conclude that Gaytan was able to understand the criminal proceedings but that she could not assist in her defense in a rational manner. Gaytan and Dr. Collister did not discuss the facts of her case because the latter wanted to avoid talking about anything that might incriminate her. He felt the test he used was the best one to assist him in determining her competency because it is objective. Gaytan's performance on the competency test was consistent with the conclusion that she was incompetent to assist her counsel in the preparation of her defense. She showed impairment in her ability to understand what would be most relevant to tell her counsel about her defense and in her ability to analyze and understand things such as a plea bargain.

Dr. Collister disagreed with the methodology used by the prosecution's expert on the competency issue because the latter did not review symptoms with Gaytan, perform any testing, or adequately review her psychological history.

2. Prosecution Evidence

Dr. Kaushal Sharma, a medical doctor specializing in forensic psychiatry and a superior court panel expert, testified on behalf of the prosecution. Dr. Sharma had over 30 years of experience practicing in the field of forensic psychiatry.

Dr. Sharma did not have Gaytan's records available to him before he interviewed her. He reviewed those records after interviewing Gaytan. He found that her responses were consistent with the information he later reviewed in the records.

Dr. Sharma interviewed Gaytan for 45 minutes. He asked her biographical questions regarding her history of psychiatric complaints, education, employment experience, relationships, criminal involvement, and drug use. She responded appropriately to all of his questions. She was cooperative and responsive. She cried during the interview, sometimes sobbing loudly. Dr. Sharma asked why she was crying and she said she missed her five children terribly. Gaytan explained that because she was in jail, they were being raised by someone else. Dr. Sharma opined that she was crying "[b]ecause of the subject matter and the reality of the situation."

Dr. Sharma told Gaytan that he did not wish to know what she did or did not do in regard to this case, pointing out that their conversation was not confidential. However, he did believe it was important to discuss the case with her in order to ascertain whether she understood the allegations against her, that a criminal case was being brought against her, the nature of the charges, and the possible punishment she faced. He stated that he sought to determine if she was able to process the information and give reasonable answers to his questions, rather than respond in a bizarre or unusual way. Gaytan was able to inform him of the charges against her in a competent fashion and she gave appropriate responses. Gaytan correctly informed Dr. Sharma of her bail amount and the date of her next court appearance. Gaytan understood that she was being prosecuted along with her husband as a codefendant, that she was facing "the possibility of being locked up forever," that the charges against her were sexual in nature and involved her daughter and her nieces, and that she was being represented by an attorney from the public defender's office. She denied being offered any plea deals. Dr. Sharma opined that Gaytan was not suffering from any mental disease, defect, or disorder that would prevent her from understanding she is charged with a criminal offense and that Gaytan was able to communicate with her attorney and provide information. He believed she

understood her role in the criminal proceedings and the nature of the proceedings. She was capable of cooperating with her attorney if she wished to do so.

Dr. Sharma stated that Gaytan did not suffer from a mental disorder or a developmental disability. She had not been diagnosed with mental retardation, and her 10th grade education did not indicate she had a developmental disability. She informed him she dropped out of school because she got pregnant. The fact Gaytan was the mother of five children and had been raising them indicated a certain level of functioning. Dr. Sharma did not conduct any psychological testing of Gaytan. If he had believed from the interview that she was developmentally disabled, he would have recommended that the court appoint a psychologist to conduct such testing, which he would not have performed because he is not a psychologist. Dr. Sharma did not believe the competency test used by Dr. Collister regarding the bar fight was useful; indeed, he called it "[p]ure nonsense." He felt the bar fight story was too indirect a method of determining competency. He preferred to simply ask direct questions about the person's understanding of the proceedings in which he or she was involved.

Based on the interview with Gaytan, her responses to his questions, and his observations, Dr. Sharma concluded that Gaytan was competent to stand trial. After writing a brief report, Dr. Sharma reviewed other documents and a recorded interview, as well as Dr. Collister's report. His review of these materials did not change his opinion, which was reflected in a second report he prepared. Dr. Sharma stated that Dr. Collister's report demonstrated that Gaytan was able to assist in her defense in a rational manner because she was able to respond in a meaningful, in-depth fashion to questioning by Dr. Collister, and therefore she could do the same with an attorney. Her IQ of 78 was an indication that she was above the mental retardation level.

Dr. Sharma did not agree with Dr. Collister that Gaytan suffered from any identifiable disorder. He allowed that in a rare case a person suffering from any of the disorders specified by Dr. Collister could be disabled from cooperating with his or her attorney. But Dr. Sharma opined that even if Gaytan did suffer from any of these

disorders, her ability to understand, answer, and cooperate with her attorney was not affected.

The jury returned a verdict finding Gaytan was competent to stand trial.

B. Analysis

Due process prohibits trying or convicting a defendant who is mentally incompetent. (*People v. Rogers* (2006) 39 Cal.4th 826, 846.) "A defendant is mentally incompetent . . . if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner." (§ 1367, subd. (a).) "It shall be presumed that the defendant is mentally competent unless it is proved by a preponderance of the evidence that the defendant is mentally incompetent." (§ 1369, subd. (f).)

"In reviewing a jury verdict that a defendant is mentally competent to stand trial, an appellate court must view the record in the light most favorable to the verdict and uphold the verdict if it is supported by substantial evidence. [Citation.] Evidence is substantial if it is reasonable, credible, and of solid value. [Citations.]" (*People v. Marshall* (1997) 15 Cal.4th 1, 31.)

Dr. Sharma, a forensic psychiatrist with lengthy experience conducting competency examinations, testified that Gaytan was competent to stand trial. He ascertained that she understood the nature of the proceedings against her and appreciated the seriousness of the situation. She also demonstrated that she was able to assist counsel in the preparation of her defense in a rational manner, as evidenced by her performance in responding appropriately and comprehensively to Dr. Sharma's and Dr. Collister's interviews. Although her IQ was low, it was above the level of mental retardation and both experts agreed that she did not have a developmental disability. Dr. Sharma stated that even if she did suffer from a mental disorder, which he did not observe, it did not interfere with her ability to rationally assist her counsel in her defense. Dr. Sharma's testimony constituted sufficient evidence to support the jury's finding that Gaytan was

competent to stand trial. Gaytan's arguments on appeal to the contrary amount to nothing more than an invitation to this court to reweigh the evidence. It is not our role to do so and we therefore affirm the verdict finding Gaytan competent to stand trial.

II. Mistrial Properly Denied During Jury Selection

A. Factual Background

During voir dire, Juror No. 2263 was seated as Juror No. 19. She said she was a married homemaker, had three grown children, and had never served on a jury. During the trial court's questioning, Juror No. 19 stated she had been molested when she was 14 years old and therefore "wouldn't be able to be on this case." In addition, Juror No. 19 said her daughter was molested by a babysitter when she was 12 years old. She handled the matter herself and did not take it to court. She said her daughter "still deals with that problem today." She added, "I feel that I wouldn't be able to really say the person was — give a decision saying the person is innocent. To me to look at a person to think that a person did something like that, it would affect me because it would go back to my problem and also my daughter."

Shortly thereafter, Gaytan's counsel addressed the jury. He said: "And I know when you hear these charges you can't help, your past — the things that happened to you in the past. You can't help that. But can you separate them. And you're being fair, Juror No. 19. You're being fair. I appreciate you being honest with saying no to that, right. This is a tough case for you." Juror No. 19 replied, "I can't do it. You don't know how it feels." Gaytan's counsel acknowledged he did not know, and Juror No. 19 repeated, "I do. You don't know how it feels." Gaytan's counsel said, "we're not arguing." Juror No. 19 apologized, adding "I've been through it. And to hear someone say someone's done that to a child, to me it's happened all over again." Gaytan's counsel said he appreciated that, and asked that the jurors be honest like Juror No. 19. He added, "What if you heard that Tania Gaytan didn't have anything to do with it?" Juror No. 19 said, "I have grand kids. I have three-year-old grand kids and I can hear the hollering to stop, to go away, to leave me alone. I was hollering to leave me alone. My mother wasn't there.

My father wasn't there. You could hear those — I can hear those kids saying stop." Gaytan's counsel said he understood it was "horrific." Juror No. 19 continued, "And my daughter when she ran to me and my husband she told us what happened." Gaytan's counsel slammed the desk and said, "I understand that." Juror No. 19 said, "Don't holler at me," and the trial court said, "Counsel, you don't need to raise your voice."

Gaytan's counsel continued, "What I'm asking you is — Ladies and Gentlemen, you're going to hear horrific things and to be fair and impartial for Ms. Gaytan, you have to separate the charges of what she's charged with. You've got to separate them. And I'm sorry, Juror No. 19, and I understand you can't be fair and that's fine." Juror No. 19 said, "Dismiss me, please. He needs to stop hollering." The trial court repeated, "Yes. Counsel, I said please don't raise your voice." Counsel repeated that the jurors were being asked to be fair and impartial.

Ramos's counsel then asked Juror No. 17 if she considered herself of the same mind as Juror No. 19, asking if she thought she could be fair; Juror No. 17 replied, "No." Juror No. 17 had previously stated she was the great grandmother of three boys, two of whom were molested. She said she did not think she would be fair and she would not be able to listen to the accusations. She said, "I know that they're not guilty but I may think — I don't know that they're guilty." She referred to the charges that had been brought against appellants. The trial court explained, "this trial isn't about what they're charged with. This trial is about whether or not there's enough evidence to convict them of the charges the People have brought."

The prosecutor then asked Juror No. 19, "you're saying this is too unbearable for you. Is that correct?" She answered in the affirmative. The prosecutor said, "[I]t's not that you can't be fair. It's just unbearable for you. Is that correct? All we need to know is that it's unbearable. It sounds like it is." Juror. No. 19 replied, "They are guilty." The prosecutor asked if she had reported her molestation to the authorities, and she replied that when she was young, "the court wasn't like it is today." Ramos's counsel asked to approach, as Juror No. 19 began to say, "My father beat me . . ." but she was interrupted as the court allowed counsel to approach.

Ramos's counsel expressed his fear that because Juror No. 19 had already blurted out "they're guilty," that she was going to taint the panel. He asked for her to be excused for cause immediately. Gaytan's counsel joined in the request, and the trial court granted it. Ramos's counsel then made a motion for a mistrial, in which Gaytan's counsel joined, based on Juror No. 19's tainting the panel with her statements, but the trial court denied that motion.

The prosecutor resumed speaking to Juror No. 17, stating that the legal system considers an accused to be presumed innocent and asking whether she understood that. She said she did and confirmed that she accepted that legal principle. The prosecutor said, "Because you have heard no evidence you only heard what we're accusing them of, you understand that they are presumed innocent?" She said yes, and agreed that she could follow the law in that regard. The prosecutor asked Juror No. 17 to promise that if she felt her previous experience was affecting her judgment and ability to serve as a rational juror, she was to tell the judge; she agreed to do so. The prosecutor noted the jurors were not being asked to disregard their life experiences, but rather asked that they not be prejudiced against one side or the other. He asked that the jurors use their life experiences to help make a decision in the case.

The court later inquired of Juror No. 17 how she felt about sitting on the case. She said, "I could listen like he said. They're just accused and I could listen and find out everything what happened and maybe I could do that." She said she could be fair to both sides.

Ramos's counsel made a motion to remove Juror No. 17 for cause, and Gaytan's counsel joined in the motion. The trial court noted that either the prosecutor had rehabilitated her quite well or she all of a sudden had a change of heart. The court continued, "I felt she could be fair. That's why I inquired again and it sounds like she can be fair." Ramos's counsel pointed out she had said three times that she could not be fair. The court replied, "She doesn't feel that way anymore." Gaytan's counsel argued, "[T]his is an actual example of a tainted jury as Juror No. 17 is completely changing her story where she couldn't be fair and now she could be fair. And I think one of the

reasons is because of what happened with Juror No. 19 and my outburst. So I apologize to the court. But for my client, Ms. Gaytan, to have a fair and impartial juror, I think with this group of people we haven't. And we see an actual example in Juror No. 17 changing her answers. So again, I would ask for a mistrial." The trial court denied the motion for mistrial.

The prosecutor noted that if Juror No. 17 had been reacting to Juror No. 19 her reaction would have been quite different. After explaining the legal principles to her, and after she became less emotional, she felt she could be fair. Ramos's counsel stated that he had asked Juror No. 17 if she could be fair and she said no, while the prosecutor only asked if she could follow the law. He argued those were different things, and following the law had nothing to do with her being fair. The court reiterated that the challenge for cause of Juror No. 17 was denied. The defense exercised a peremptory challenge to remove Juror No. 17 from the panel.

Later, another Juror No. 19 stated she was a teacher, and informed the court that her best friend and the best friend's siblings had been molested by their father, and their mother knew about it and did nothing to stop it. Furthermore, Juror No. 19 had been a teacher for almost 40 years and had never known a child who reported sexual abuse to be lying, "so I kind of have the assumption that . . . these people are guilty." The court said, "And you don't think you could be a fair juror because [of that]?" She reiterated, "I would have the assumption that if these children involved said it that they're telling the truth."

Gaytan's counsel reiterated to the jury that the parties were looking for fair and impartial jurors. The prosecutor then addressed Juror No. 19, noting that she had expressed that she felt "that a child wouldn't lie about something like this." She said, "That has been my experience." He asked why she believed she was not fit to be on the jury, and she said she would be more likely to conclude they were guilty.[2] The

---

[2] There is an apparent transcription error at this point in the record, with the reporter indicating that Juror No. 21 was speaking. However, it is clear from the fact the

prosecutor asked if she thought the child witnesses in the case were lying, would she vote not guilty. She responded, "I'm just telling you my experience that children don't lie. And I told you my experience with my friend [and her siblings] who w[ere] molested by her father and her mother witnessed that and did nothing. . . . So for those reasons I feel I would not be fair in this case."

The prosecutor addressed other prospective jurors, asking them not to consider punishment and only consider the facts, and asking whether they would find appellants guilty if he met his burden of proving the case beyond a reasonable doubt. He asked if anyone felt that a child witness was not as credible as an adult and whether they would automatically discount a child's testimony. He questioned whether a witness's delay in reporting molestation would affect the jurors' view of her credibility. He also discussed jury nullification.

The trial court then dismissed the new Juror No. 19 for cause. Appellants' trial counsel both renewed their motion for mistrial, arguing that the two Juror No. 19's comments had tainted the panel. Gaytan's counsel believed the panel contained an unusually high number of people who reported having personal experience involving child molestation, such that appellants could not get a fair trial. The prosecutor replied that Juror No. 19 merely related her own life experience. The trial court again denied the motion for mistrial.

Later, prior to G.C. taking the stand, seated Juror No. 1 asked to speak to the trial court. With the parties and counsel present, she told the court she had a brain storm the previous night after attending a Christian meeting. She looked at a magazine designed for young people from "all ethnic backgrounds" and "with all types of problems that young people have" such as peer pressure, dating, and getting along with parents. The publication offered scriptural guidance to help young people with their problems. Juror No. 1 thought the court "might benefit with the case that has come before you, with these young people" and that the young people in the case would benefit from it as well. The

---

prosecutor specifically addressed Juror No. 19 and from the context that Juror No. 19 is the speaker.

court stated it appreciated her thoughts on that, but he could not permit that. The court asked if this had anything to do with her thoughts on the case or the merits of the case. She replied, "No. Just help for, you know, these problems . . . [t]o deal with the different issues that come up in their lives." The court clarified, "Generally," and Juror No. 1 agreed. The court asked if she had discussed this with any of the other jurors and she said she had not. The court instructed her not to do so. She said she definitely understood the presumption of innocence and that this had not affected her impartiality.

Gaytan's counsel moved for a mistrial, arguing that Gaytan could not "get a fair and impartial trial here because of all the prejudice from the great amount of potential jurors that expressed their feelings about this issue, child molestation, so forth. Now, we have an actual juror, Juror No. 1, that comes in and wants to give you a book related to that issue." The court responded that the book was about life in general. Gaytan's counsel argued that, "based on all the things that happened before, as well as what's happening now," a mistrial was warranted.

Ramos's counsel joined in the motion for mistrial, expressing concern that Juror No. 1 only expressed a desire to help the young people and not appellants. He continued, "She already has it in her mind, as I think all these jurors do, based on what they heard during voir dire and what has been going on in this trial, that her sympathy immediately lie [*sic*] with the four young people who testified, and not these people sitting here." The court replied that if Juror No. 1 had sympathy for and wanted to help appellants it could mean she thought they needed help because they're involved in wrongdoing. The prosecutor argued that Juror No. 1 had in fact demonstrated her ability to follow the law by stating that appellants were presumed innocent and that she viewed them as innocent. The court denied the motion for mistrial.

B. Analysis

Appellants argue that the trial court erred by denying the two motions for mistrial brought during voir dire. They further contend that the court should have sua sponte

removed Juror No. 1 and replaced her with an alternate juror after she approached the court and offered a religious publication intended for young people. We find no error.

A criminal defendant has the constitutional right to have a fair and impartial jury determine guilt or innocence. (U.S. Const., 7th & 14th Amends.; Cal. Const., art. I, § 16; *People v. Wheeler* (1978) 22 Cal.3d 258, 265.) "Even if 'only one juror is unduly biased or prejudiced,' the defendant is denied his constitutional right to an impartial jury." (*United States v. Eubanks* (9th Cir. 1979) 591 F.2d 513, 517; see also *United States v. Allsup* (9th Cir. 1977) 566 F.2d 68, 71.) Due process requires that the defendant be tried by a jury capable and willing to decide the case solely on the evidence before it. (*Smith v. Phillips* (1982) 455 U.S. 209, 217.)

However, Code of Civil Procedure section 223 provides in pertinent part that, "The trial court's exercise of its discretion in the manner in which voir dire is conducted . . . shall not cause any conviction to be reversed unless the exercise of that discretion has resulted in a miscarriage of justice, as specified in Section 13 of Article VI of the California Constitution." "[T]he trial court possesses broad discretion to determine whether or not possible bias or prejudice against the defendant has contaminated the entire venire to such an extreme that its discharge is required . . . . [D]ischarging the entire venire is a remedy that should be reserved for the most serious occasions of demonstrated bias or prejudice, where interrogation and removal of the offending venirepersons would be insufficient protection for the defendant." (*People v. Medina* (1990) 51 Cal.3d 870, 889.)

"The conclusion of a trial judge on the question of individual juror bias and prejudice is entitled to great deference and is reversed on appeal only upon a clear showing of abuse of discretion." (*People v. Martinez* (1991) 228 Cal.App.3d 1456, 1466 (*Martinez*).)

"In order to determine whether the trial court permitted the jury panel to be exposed to views so biased and prejudiced that we must presume, absent more extensive admonition, the panel as a whole could not be fair and impartial, we must look to the totality of the circumstances surrounding jury selection." (*Martinez, supra*, 228

Cal.App.3d at p. 1465.) In *Martinez*, certain jurors made hostile comments in response to defense counsel's questioning, and the remaining jurors were questioned regarding the impact of those comments. Their responses did not reflect a bias or prejudice against the defendant. The trial court intervened and reiterated the principles of determining guilt or innocence. None of the jurors indicated that he or she would be unable to set aside his or her beliefs or opinions in the case against the defendant and judge the facts fairly and impartially. (*Id.* at pp. 1465-1466.) The denial of the motion to discharge the entire panel was upheld on appeal. (*Id.* at pp. 1466-1467.)

1. The First Juror No. 19

The first mistrial motion was made after Juror No. 19 stated both she and her daughter had been molested as children and that it would be difficult for her to participate in the trial because it would cause her to relive her past experiences. Shortly after Gaytan's counsel raised his voice at her in apparent frustration, the prosecutor asked Juror No. 19 if it would be unbearable for her to participate, to which she replied, "They are guilty."

Juror No. 19 was immediately removed for cause, and defense counsel then moved for mistrial, arguing that Juror No. 19 had tainted the panel with her statements. The trial court denied the motion. We find no abuse of discretion, as Juror No. 19 was merely relating her personal experiences and the beliefs she had formed as a result. She made clear that it was an emotional subject for her and she could not bear to participate in the trial because it would cause her to relive her negative experiences. There is no indication in the record that any of the other potential jurors took her comments for anything other than expressions of discomfort by a person who had suffered trauma in the past. The court specifically found that Juror No. 17, who had initially expressed doubts that she could be fair, had been rehabilitated by the prosecutor's discussion of the burden of proof and presumption of innocence. The court questioned Juror No. 17 and concluded that she could be fair. The court considered but rejected Gaytan's counsel's contention that Juror

No. 17 was an example of a juror tainted by Juror No. 19's comments.[3] The trial court observed the effect on the other jurors and concluded Juror No. 19's remarks had not tainted the panel, and we defer to the court's observations and conclusions in the absence of any clear showing of abuse of discretion.

2. The Second Juror No. 19

The person who took the place of Juror No. 19 told the court she had been a teacher for 40 years. She said she had never known a child who reported sexual abuse to be lying and that she assumed appellants were guilty. She also felt she could not be fair because she had a close friend who had been molested as a child. Appellants contend that these comments "could not help but set the tone for the forthcoming trial with an assessment by an experienced professional in these types of cases and thereby undermine appellant[s'] constitutional right to the presumption of innocence."

We disagree that Juror No. 19 was "an experienced professional in these types of cases." She did not indicate that she had seen countless examples of child molestation during her career as a teacher. Rather, she simply said that in her experience the children who reported sexual abuse had been truthful. This shaped her own views on the subject, but she did not purport to be educating the other potential jurors on the subject. We liken the situation to that in *People v. Cleveland* (2004) 32 Cal.4th 704. In that case, the defendant argued that a prospective juror's prejudicial comments tainted the entire venire in a capital case. The juror was a retired law enforcement officer, experienced in homicide cases, "who had testified in court over a thousand times." (*Id.* at p. 735.) The juror "expressed the opinion that the death penalty was 'too seldom [used] due to legal obstructions.'" (*Ibid.*) He also told the court he should not remain on the case because "'it would be unfair to the defense based on my knowledge of how these trials are conducted.'" (*Ibid.*) The Supreme Court, addressing the merits of the contention that a new venire should have been summoned, observed that "[m]any prospective jurors

---

3 The trial court denied defense counsel's request to remove Juror No. 17 for cause; defense counsel then exercised a peremptory challenge to remove her.

express many different general opinions regarding the judicial system. These expressions of opinion do not taint the jury. The comments here did not give the other prospective jurors information specific to the case, but just exposed them to one person's opinion about the judicial system. [Citation.] The circumstance that this particular opinion came from a retired peace officer with experience in homicide cases and trial proceedings does not change matters. It would no more prejudice a jury panel to hear that a retired (or active) peace officer believes the system is tilted in favor of defendants than to hear a criminal defense attorney express the opposite view." (*Id.* at p. 736.) Similarly here, the jurors were exposed to one person's opinion about child molestation cases and, even though the speaker was a teacher, her comments did not carry the weight of an expert opinion or impart information specific to the case.

In addition, the prosecutor discussed witness credibility with the other jurors and asked if anyone would view a witness as being less credible because he or she was a child. In response, one juror, a parent of five children, stated that children were not always truthful and that there was always room for doubt. On the whole, the potential jurors appeared to have an open-minded, balanced view regarding the credibility of the witnesses from whom they would hear. Again, the court observed their reactions and responses after the second Juror No. 19 made her comments and saw nothing to suggest the panel had been tainted. The court was satisfied that the panel members could be fair and abide by the presumption of innocence. We find nothing in the record to contradict the court's conclusions, and therefore find that the second motion for mistrial was also properly denied.

3. Juror No. 1

Finally, appellants contend that the trial court should have removed Juror No. 1 from the panel and replaced her with an alternate juror after she offered to provide a spiritual text to aid the court and the young witnesses. Defense counsel did not request removal of the juror, instead unsuccessfully moving for mistrial, and appellants are therefore arguing the trial court should have removed the juror sua sponte. Alternatively,

they argue that their trial counsel was ineffective for failing to request removal of Juror No. 1. We conclude that the trial court did not abuse its discretion in concluding that Juror No. 1 had not demonstrated partiality to the victims. Sua sponte removal of the juror was not warranted, and appellants' counsel were not ineffective for failing to request her removal.

Juror No. 1 indicated that she had attended a Christian meeting and the thought came to her to tell the court about a publication aimed at young people to help them deal with common problems through scripture. She did not indicate that the book addressed issues such as sexual abuse, citing instead issues such as peer pressure, dating, and getting along with parents. The court clarified that the publication had nothing to do with the juror's thoughts on the case and that it addressed issues that arise for young people "[g]enerally." The court instructed her not to discuss the publication with the other jurors. The juror demonstrated that she understood the presumption of innocence and said these thoughts had not affected her ability to be impartial.

The court was in the best position to evaluate the veracity of the juror's statements and whether she had prejudged the merits of the case. There is nothing inherent in what the juror said to indicate she had already decided appellants were guilty. She offered the publication of which she happened to be aware, which was directed toward young people, for the benefit of the court in this and presumably future cases, and also for the young people involved. It did not appear that she had searched for the publication because she wanted to find a way to help them. Indeed, from her description of the contents of the publication, it could be argued that she might have thought that the young witnesses needed assistance with getting along with their parents. In any event, we conclude that Juror No. 1 did not demonstrate by her comments that she had already decided the merits of the case. There was no good cause demonstrated whereby the trial court would be justified in discharging the juror on the basis of inability to perform her duty. (§ 1089.) Removal of Juror No. 1 was not warranted. Accordingly, we further conclude that trial counsel did not perform in a deficient manner by failing to request removal of the juror.

III. Aider and Abettor Liability

Gaytan contends that her conviction must be reversed because the trial court failed to instruct the jury with regard to the effect of her mental state on her intent to aid and abet Ramos. We disagree.

As the California Supreme Court has stated: "We analyzed aiding and abetting liability in detail in *People v. McCoy* (2001) 25 Cal.4th 1111. There, we explained that an aider and abettor's guilt 'is based on a combination of the direct perpetrator's acts and the aider and abettor's own acts and own mental state.' (*Id.* at p. 1117, italics omitted.) '"[O]nce it is proved that 'the principal has caused an *actus reus*, the liability of each of the secondary parties should be assessed according to his own *mens rea*.'"' (*Id.* at p. 1118, quoting Dressler, Understanding Criminal Law (2d ed. 1995) § 30.06[C], p. 450.) Thus, proof of aider and abettor liability requires proof in three distinct areas: (a) the direct perpetrator's actus reus—a crime committed by the direct perpetrator, (b) the aider and abettor's mens rea—knowledge of the direct perpetrator's unlawful intent and an intent to assist in achieving those unlawful ends, and (c) the aider and abettor's actus reus—conduct by the aider and abettor that in fact assists the achievement of the crime. (See *McCoy*, at p. 1117.)" (*People v. Perez* (2005) 35 Cal.4th 1219, 1225.)

In accordance with the legal standards governing aider and abettor liability, the jury here was instructed with CALCRIM Nos. 400 and 401. CALCRIM No. 400 was given as follows: "A person may be guilty of a crime in two ways. One, he or she may have directly committed the crime. I will call that person the perpetrator. Two, he or she may have aided and abetted a perpetrator, who directly committed the crime. [¶] A person is guilty of a crime whether he or she committed it personally or aided and abetted the perpetrator. "

The court also gave the following version of CALCRIM No. 401: "To prove that the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that: [¶] 1. The perpetrator committed the crime; [¶] 2. The defendant knew that the perpetrator intended to commit the crime; [¶] 3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the

crime; [¶] AND [¶] 4. The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime.

"Someone aids and abets a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime. [¶] If all of these requirements are proved, the defendant does not need to actually have been present when the crime was committed to be guilty as an aider and abettor. [¶] [If you conclude that defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor. However, the fact that a person is present at the scene of a crime or fails to prevent the crime does not, by itself, make him or her an aider and abettor.]

"[A person who aids and abets a crime is not guilty of that crime if he or she withdraws before the crime is committed. To withdraw, a person must do two things: [¶] 1. He or she must notify everyone else he or she knows is involved in the commission of the crime that he or she is no longer participating. The notification must be made early enough to prevent the commission of the crime. [¶] AND [¶] 2. He or she must do everything reasonably within his or her power to prevent the crime from being committed. He or she does not have to actually prevent the crime.

"The People have the burden of proving beyond a reasonable doubt that the defendant did not withdraw. If the People have not met this burden, you may not find the defendant guilty under an aiding and abetting theory.]"

Gaytan's counsel requested a special instruction regarding aiding and abetting, as follows: "The Aider and Abettor must share the requisite specific intent with the perpetrator. '[A]n aider and abettor will "share" the perpetrator's specific intent when she knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime(s)'

"The Aider and Abettor must share the Perpetrator's specific intent.

"(The People have to prove that the Aider and Abettor share the Perpetrator's specific intent.)" Gaytan's counsel argued that this instruction was needed because CALCRIM No. 401 did not make clear that if a specific intent crime is aided and abetted, the aider and abettor must share the same specific intent as the perpetrator. The prosecutor argued that CALCRIM No. 401 adequately explained that principle and giving the special instruction would only confuse the issue. The court refused to give the special instruction, concluding that CALCRIM No. 401 "lays [it] out very clearly."

On appeal, although Gaytan frames the issue as a failure of adequate instruction, she does not argue that the court erred by refusing to give the special instruction or that the instructions as given were erroneous. Instead, she asserts that her actions regarding the victims could be interpreted as having an intent and purpose other than to aid, facilitate, promote, encourage, or instigate Ramos's commission of the crimes, to wit, "a misguided attempt to help her husband's victims." She argues that her "conduct equally supports the inference that her purpose in doing what she did was to mitigate the harm being done to the children she loved." She asserts it would be a "legal tragedy . . . to find sufficient evidence that appellant specifically intended to facilitate the abuse she saw as inevitable, but tried to alleviate." Thus, Gaytan's argument boils down to a contention that the evidence was insufficient to support her convictions, even as Gaytan argues that the evidence "*equally* supports the inference that her purpose" was not to facilitate the abuse. (Italics added.) We disagree that the evidence equally supports that inference. In any event, we conclude that the evidence of Gaytan's intent was sufficient to support the convictions, and the jury was properly instructed in how to evaluate the element of intent.

Unlike in *People v. Yarber* (1979) 90 Cal.App.3d 895, on which Gaytan primarily relies, the jury here was properly instructed as to the element of the requisite intent for aider and abettor liability—that the aider and abettor "knows of the perpetrator's unlawful purpose and he or she *specifically intends to*, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime." (CALCRIM No. 401, italics added.) The jury heard testimony from the victims regarding Gaytan's actions such as telling the girls that Ramos was going to do something to them,

telling them to enjoy it, placing pillows over their faces, reassuring V. that vaginal bleeding after sexual penetration was normal, and telling the girls when Ramos was "almost done." The girls all considered her a mother figure (and she was in fact A.'s mother), and as V. testified, her presence had the effect of promoting her acquiescence. Clearly there was substantial evidence before the jury that Gaytan had the requisite intent of facilitating Ramos's commission of the crimes, and the jury concluded she did. The jury having been properly instructed and the evidence being sufficient to support the jury's finding of intent, we will not reverse the convictions.

IV. Sufficiency of the Evidence of Force, Fear, Duress, or Menace

Ramos contends that the evidence was insufficient as a matter of law to support the "'force, fear, duress, or menace'" elements as to count 1 (forcible lewd or lascivious act with child under 14, § 288, subd. (b)), which related to the sexual abuse of V. at appellants' Compton residence between April 26, 2000, and April 24, 2001. Gaytan joins in this argument to the extent her liability was predicated on Ramos's use of force or duress and not her independent use of force or duress. Gaytan further contends that the evidence of force or duress was insufficient to support her conviction as to count 3 regarding G., and Ramos joins in this argument. Appellants argue we should reverse their convictions or, in the alternative, modify the verdicts to instead reflect convictions of the lesser included offense of nonforcible lewd conduct pursuant to subdivision (a) of section 288. We disagree.

"When an appellant challenges the sufficiency of the evidence to support a conviction, the appellate court reviews the entire record to see '"whether it contains substantial evidence—i.e., evidence that is credible and of solid value—from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt."' (*People v. Jennings* (1991) 53 Cal.3d 334, 364.) We view the facts in the light most favorable to the judgment, drawing all reasonable inferences in its support. [Citations.] We do not reweigh the evidence, resolve conflicts in the evidence, or reevaluate the credibility of witnesses. (See *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; [additional

citation omitted].) The test on appeal is not whether we believe the evidence established the defendant's guilt beyond a reasonable doubt, but whether '"'*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'"' [Citations.]" (*People v. Cochran* (2002) 103 Cal.App.4th 8, 12-13 (*Cochran*).)

Forcible lewd acts on a child under the age of 14 years requires proof that "force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person" was used. (§ 288, subd. (b)(1).) Most relevant here is the use in section 288, subdivision (b) of the word "duress." Case law has held that "[t]he very nature of duress is psychological coercion" (*Cochran*, *supra*, 103 Cal.App.4th at p. 15), and thus the use of physical force is not required to support a conviction of a forcible lewd act. "'Duress' as used in this context means 'a direct or implied threat of force, violence, danger, hardship or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to (1) perform an act which otherwise would not have been performed or, (2) acquiesce in an act to which one otherwise would not have submitted.' (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 50; *People v. Wilkerson* (1992) 6 Cal.App.4th 1571, 1578-1579.) 'The total circumstances, including the age of the victim, and [her] relationship to defendant are factors to be considered in appraising the existence of duress.' (*People v. Pitmon*, *supra*, at p. 51.) Other relevant factors include threats to harm the victim, physically controlling the victim when the victim attempts to resist, and warnings to the victim that revealing the molestation would result in jeopardizing the family. [Citations.]" (*Cochran*, *supra*, at pp. 13-14.) ("[S]ee also *People v. Sanchez* (1989) 208 Cal.App.3d 721, 747-748 [duress found where defendant molested eight-year-old granddaughter repeatedly over a three-year period and victim viewed defendant as a father figure]; *People v. Superior Court* (*Kneip*) (1990) 219 Cal.App.3d 235, 239 ['Where the defendant is a family member and the victim is young, . . . the position of dominance and authority of the defendant and his continuous exploitation of the victim' is relevant to determining duress].)" (*Cochran*, *supra*, at p. 14.)

CALCRIM No. 1111, as given to the jury here, provided in pertinent part the following guidance: "The force used must be substantially different from or substantially

greater than the force needed to accomplish the act itself. [Duress means a direct or implied threat of force, violence, danger, hardship, or retribution that causes a reasonable person to do [or submit to] something that he or she would not otherwise do [or submit to]. When deciding whether the act was accomplished by duress, consider all the circumstances, including the age of the child and her relationship to the defendant.]"

Respondent argues that duress can be implied from, among other things, V.'s age (10) and Ramos's dominance and position of familial authority. In *Cochran*, the court noted that, not as a matter of law, but "as a factual matter, when the victim is as young as this victim [9] and is molested by her father in the family home, in all but the rarest cases duress will be present." (*Cochran*, *supra*, 103 Cal.App.4th at p. 16, fn. 6.) We agree and find there was sufficient evidence to support a finding of duress within the meaning of section 288, subdivision (b).

The record paints a picture of a large, close-knit, extended family living together in close quarters. Gaytan's nieces testified that Gaytan was like a mother to them, and of course she is A.'s mother. Ramos, as her husband, was also viewed as an authority figure by these young girls. Gaytan exploited her close relationship with V. and the girl's trust to coerce her to submit to Ramos's sexual abuse. She told V. that Ramos was "going to do something" and instructed V. to "lay down and enjoy it." Gaytan put a pillow over her face, perhaps to block her view of the sexual act being performed but also presumably to muffle any noise she might make that would alert other family members. As Gaytan cleaned the blood from V.'s vagina she told her that "it's nothing bad" and that "it's normal," once again placing her seal of approval on what had just occurred. V. felt that Gaytan made it seem like the rape was acceptable. There can be no doubt that Ramos and Gaytan, acting in collaboration, used their positions of trust and authority to coerce V. to submit to an act of intercourse. Without appellants even having to speak the words, and although V. knew that what they were doing was wrong, she understood that revealing their actions would destroy the extended family relationships. Clearly appellants created an implied threat of hardship—in the specter of disrupting the extended family and garnering the disapproval of beloved authority figures—sufficient to

coerce V. to acquiesce in an act to which she otherwise would not have submitted. (*People v. Pitmon, supra,* 170 Cal.App.3d at p. 50.)

In addition, as to count 3 involving G., when Ramos penetrated her vagina with his penis, she tried to get up but Ramos pushed her back down. We agree with respondent that this application of physical force to overcome G.'s resistance and accomplish the sexual penetration was sufficient to establish the element of force as to Ramos. (See *People v. Bolander* (1994) 23 Cal.App.4th 155, 161, disapproved on other grounds in *People v. Soto* (2011) 51 Cal.4th 229, 248 & fn. 12, [sufficient evidence of force based on the "defendant's acts of overcoming the victim's resistance to having his pants pulled down, bending the victim over, and pulling the victim's waist towards him"]; *People v. Babcock* (1993) 14 Cal.App.4th 383, 386, 388 (*Babcock*) [evidence that the defendant grabbed the victims' hands and forced them to touch his genitals was held sufficient to show the requisite force]; but see *People v. Schulz* (1992) 2 Cal.App.4th 999, 1004 (*Schulz*); and *People v. Senior* (1992) 3 Cal.App.4th 765, 774 (*Senior*).)[4] It was also sufficient as to Gaytan, given that she was convicted on an aiding and abetting theory. Indeed, the evidence as to Gaytan's conduct in using her position of trust and authority to coerce G. to submit to Ramos "do[ing] something to [her]" as Gaytan muffled her face with a pillow is sufficient evidence of duress. Accordingly, appellants' convictions on counts 1 and 3 are affirmed.

---

4 We agree with the statement made by the court in *Babcock, supra,* regarding *Schulz* and *Senior*: "We decline defendant's invitation to follow the dicta in *People v. Schulz, supra,* 2 Cal.App.4th 999, and *People v. Senior, supra,* 3 Cal.App.4th 765. In our view, the fatal flaw in defendant's argument, and in the analyses in *Schulz* and *Senior,* is in their improper attempt to merge the lewd acts and the force by which they were accomplished *as a matter of law*. Unlike the court in *Schulz,* we do not believe that holding a victim who was trying to escape in a corner is necessarily an element of the lewd act of touching her vagina and breasts. Unlike the court in *Senior*, we do not believe that pulling a victim back as she tried to get away is necessarily an element of oral copulation. And, unlike the defendant in this case, we do not believe that grabbing the victims' hands and overcoming the resistance of an eight-year-old child are necessarily elements of the lewd acts of touching defendant's crotch." (*Babcock, supra,* 14 Cal.App.4th at p. 388.)

V. Punishment Under the One Strike Law for Continuous Sexual Abuse of a Child Violated Ex Post Facto Laws

The jury convicted appellants on count 2, which alleged that appellants engaged in continuous sexual abuse (§ 288.5) of V. between the dates of April 25, 2001, and April 24, 2004. The court imposed a consecutive One Strike term of 15 years to life on count 2, pursuant to section 667.61. Appellants contend that continuous sexual abuse (§ 288.5) was not an offense enumerated in section 667.61 until the Legislature added it in 2006 (Stats. 2006, ch. 337, § 33, eff. Sep. 20, 2006), and thus the court erred by imposing sentences on count 2 that violated the constitutional prohibition against ex post facto laws.

The Attorney General concedes that appellants are correct. We agree. (See *People v. Palmer* (2001) 86 Cal.App.4th 440, 443-446 [defendant improperly sentenced under One Strike law for two counts of continuous sexual abuse because § 288.5 was not listed as an enumerated offense in § 667.61, subd. (c) at the time defendant committed the offenses].) Accordingly, we remand the matter to the trial court for resentencing as to count 2 with directions to impose a term authorized by law, without application of section 667.61.[5]

VI. Gaytan's Sentence Does Not Constitute Cruel and/or Unusual Punishment

Finally, Gaytan contends that her sentence of 75 years to life constitutes cruel and/or unusual punishment, in violation of the state and federal Constitutions. We disagree.

---

[5] Appellants contend in the alternative that One Strike life terms based solely on the "multiple-victim" provision set forth in section 667.61, subdivision (e)(5) may be imposed once for each victim, whether committed on the same occasion or on separate occasions, but not more than one such sentence per victim may be imposed. Given our conclusion in this section that the matter must be remanded for resentencing on count 2, this contention is moot and we need not address it.

A punishment may be considered unconstitutionally excessive in violation of the federal Constitution's Eighth Amendment prohibition against cruel and unusual punishment if it is grossly disproportionate to the severity of the crime. (*Gregg v. Georgia* (1976) 428 U.S. 153, 173.) Similarly, a punishment may violate the California Constitution if it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity. (*In re Lynch* (1972) 8 Cal.3d 410, 424.)

"In order to determine whether a particular punishment is disproportionate to the offense for which it is imposed, we conduct a three-pronged analysis. (*People v. Dillon* [(1983)] 34 Cal.3d 441, 479; *In re Lynch, supra*, 8 Cal.3d 410, 429-438.) First, we examine the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society. A look at the nature of the offense includes a look at the totality of the circumstances, including motive, the way the crime was committed, the extent of the defendant's involvement, and the consequences of defendant's acts. A look at the nature of the offender includes an inquiry into whether 'the punishment is grossly disproportionate to the defendant's individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind.' (*People v. Dillon, supra*, 34 Cal.3d 441, 479.) Next, we compare the challenged punishment with the punishment prescribed for more serious crimes in the same jurisdiction. And finally, the challenged punishment is compared with punishment for the same offense in other jurisdictions. [¶] This three-pronged analysis provides guidelines for determining whether a punishment is cruel or unusual. The importance of each prong depends on the facts of each case. An examination of the first prong alone can result in a finding of cruel or unusual punishment. (*People v. Dillon, supra*, 34 Cal.3d 441, 479, 482-483; *People v. Young* (1992) 11 Cal.App.4th 1299, 1308-1311.)" (*People v. Thongvilay* (1998) 62 Cal.App.4th 71, 88.)[6]

---

[6] For the purposes of our examination, we assume this test is appropriate in an Eighth Amendment analysis. (See *People v. Goodwin* (1997) 59 Cal.App.4th 1084, 1093; *Harmelin v. Michigan* (1991) 501 U.S. 957.)

Gaytan concedes that the second and third factors do not support her position. She instead contends that the first factor alone supports a finding that her sentence is cruel and unusual primarily because "[f]emale sex offenders as a group share many of the diminished capacity characteristics of juvenile and mentally deficient offenders." Based on Dr. Collister's testing, Gaytan contends she has the abstract reasoning capacity of a 10-year-old and an IQ of 78 (concededly above the cutoff of 70 points for mental retardation). She possesses many of the characteristics that are common to female sex offenders such as vulnerability to coercion by a male partner, dependent personality disorder, substance abuse, a history of physical and sexual abuse, and posttraumatic stress disorder. She also points to the fact that the victims and other family members asked for leniency on her behalf and the victims said they still loved her. She contends that unlike Ramos she was not a sexual predator.

The recent Supreme Court cases Gaytan cites involving juvenile offenders, *Miller v. Alabama* (2012) ___ U.S. ___ [132 S.Ct. 2455, 183 L.Ed.2d 407] and *Graham v. Florida* (2010) ___ U.S. ___ [130 S.Ct. 2011, 176 L.Ed.2d 825], are irrelevant. She was 23 years old when the abuse of V. began and 32 at the time of her arrest. She cannot equate herself to a juvenile based on Dr. Collister's statement that she has the abstract reasoning capacity of a 10-year-old. She functioned as an adult, raising children and running a household, and had life experience that a juvenile would not. Nor was she so mentally deficient that she could be considered as having a developmental disability.

In the final analysis, Gaytan showed a shocking lack of concern for the girls' well-being. She emotionally damaged and confused them still further by directing them to "enjoy" what Ramos was doing to them and acting as if what was happening was acceptable, even as she covered their faces with a pillow and at times tried to keep them away from Ramos. Yet scores of times over an eight-year period, she affirmatively assisted Ramos, luring the girls within his reach and subduing their resistance. Regardless of any dependent personality disorder, substance abuse, or purported coercion by Ramos, she never did anything to stop the abuse or her active participation in it. She

was surrounded by sisters and other family members but never attempted to extricate herself or the children she supposedly loved from an odious situation.

Gaytan, like the defendant in *People v. Alvarado* (2001) 87 Cal.App.4th 178, is precisely the sort of offender that deserves severe punishment. As the *Alvarado* court observed: "Defendant's troubled background, lack of a criminal record, and sincere remorse may militate for a more lenient punishment. However, his age, substance abuse, and 'immature dependent personality disorder' do not suggest that he failed to grasp the nature and consequences of his conduct and thereby further support more lenient treatment. Despite defendant's age, substance abuse, and disorder, he fully recognized and acknowledged the magnitude of his conduct immediately after being caught. Moreover, the callous and opportunistic nature of his sexual assault against a neighbor he knew to be particularly vulnerable seems to us precisely the sort of sexual offense that warrants harsh punishment." (*Id.* at pp. 199-200.)

Given the seriousness of the crimes, the vulnerability of the victims, and the level of Gaytan's participation, there is no reasoned basis for concluding that a sentence of 75 years to life is cruel and/or unusual punishment. We conclude Gaytan's punishment does not violate the federal or state proscriptions against cruel and/or unusual punishment.

DISPOSITION

Appellants' sentences on count 2 are vacated and the matter is remanded to the trial court for resentencing on count 2 without application of the One Strike law. The judgments of conviction are otherwise affirmed. Upon resentencing, the clerk of the superior court is directed to prepare a new abstract of judgment and forward a copy to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

SUZUKAWA, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.